

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

MARCH 23, 2001

IN RE:

APPLICATION OF MEMPHIS NETWORKX, LLC,)	
FOR A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO PROVIDE)	
INTRASTATE TELECOMMUNICATION)	
SERVICES AND JOINT PETITION OF MEMPHIS)	DOCKET NO. 99-00909
LIGHT GAS & WATER DIVISION, A DIVISION)	
OF THE CITY OF MEMPHIS, TENNESSEE)	
("MLGW") AND A&L NETWORKS-TENNESSEE,)	
LLC ("A&L"), FOR APPROVAL OF AGREEMENT)	
BETWEEN MLGW AND A&L REGARDING JOINT)	
OWNERSHIP OF MEMPHIS NETWORKX, LLC.)	

**ORDER REFLECTING ACTION TAKEN BY
THE PRE-HEARING OFFICER AT MARCH 8, 2001 PRE-HEARING CONFERENCE
AND RULINGS ON MOTIONS AND REQUESTS RELATING TO DISCOVERY
MATTERS**

This matter is before the Pre-Hearing Officer for a determination of preliminary matters in preparation for Hearing. At a Pre-Hearing Conference held on March 8, 2001 the Pre-Hearing Officer considered the following issues: 1) *Applicant's and Joint Petitioners' Objections and Initial Responses to the Data Requests of the Tennessee Cable Telecommunications Association, Time Warner Telecommunications, and Time Warner Telecom of the Mid-South, L.P.* filed by Memphis Light Gas and Water ("MLGW") and Memphis Broadband, LLC (collectively "Joint Petitioners") and Memphis Networkx, LLC ("Applicant") on February 12, 2001; 2) *Motion to Compel Responses to Data Requests Submitted by Tennessee Cable Telecommunications Association and Time Warner Telecom, Inc.* filed by Tennessee Cable Telecommunications Association and Time Warner Telecom, Inc. (collectively "Time Warner") on February 15.

2001; and 3) *Applicant's and Joint Petitioner's Motion to Quash Subpoenas Deuces Tecum of Andrew P. Seamons, Larry Thompson, Alex Lowe, and Ward Huddleston and Motion for Order that Discovery Depositions Not be Had Due to Errors and Irregularities* filed by Applicant and Joint Petitioners on February 26, 2001. Subsequent thereto the parties filed a Joint Stipulation on March 13, 2001 resolving several discovery disputes and conducted depositions on March 19, 2001.

BACKGROUND

The Pre-Hearing Officer convened a Pre-Hearing Conference on January 29, 2001 for the purposes of: discussing the status of this docket following the filing of the Amended Application; establishing threshold issues; determining the necessity of additional discovery between the parties; considering stipulations/admissions of facts and documents; and establishing a schedule to completion. On February 9, 2001, the Pre-Hearing Officer entered an *Order Granting IBEW's Motion to Withdraw, Establishing Procedural Schedule, and Setting Hearing Date* reflecting the actions taken at the January 29, 2001 Pre-Hearing Conference.

As reflected in the Order, the Pre-Hearing Officer determined that "additional discovery would be necessary as a result of the filing of the Amended Application and additional pre-filed testimony, but limited the scope of such discovery to the new issues raised by the Amended Application and pre-filed testimony submitted therewith."¹ Thereafter, the Pre-Hearing Officer, with the agreement of the parties, established the following filing schedule: discovery requests to be filed by February 5, 2001; objections to discovery requests to be filed by February 12, 2001; responses to discovery requests and motions to compel to be filed by February 15, 2001; and pre-

¹ *Order Granting IBEW's Motion to Withdraw, Establishing Procedural Schedule, and Setting Hearing Date*, p. 6 (Feb. 9, 2001).

filed rebuttal testimony to be filed by March 1, 2001. The Pre-Hearing Officer permitted depositions, but ordered that the parties must complete any depositions by March 1, 2001.

In accordance with the procedural schedule, Applicant and Joint Petitioners filed *Applicant's and Joint Petitioners' Objections and Initial Responses to the Data Requests of the Tennessee Cable Telecommunications Association, Time Warner Telecommunications, Time Warner Telecom of the Mid-South, L.P.* ("Objections") on February 12, 2001. Applicant and Joint Petitioners objected to 35 of the 39 data requests proffered by Time Warner. In response thereto and as provided for in the procedural schedule, Time Warner filed a *Motion to Compel Responses to Data Requests Submitted by Tennessee Cable Telecommunications Association and Time Warner Telecom, Inc.* ("Motion to Compel") on February 15, 2001.

On February 16, 2001, the Pre-Hearing Officer issued an *Order Directing Supplemental Filings*. The Pre-Hearing Officer made the following findings:

[T]he Pre-Hearing Officer finds that the filings are incomplete and require supplementation. Specifically, Applicant and Joint Petitioners determined to categorize their objections to the data requests by asserting six (6) general objections and then referencing the number of the pertinent objection to the individual request. Objection Number 1 is referred to as "beyond the scope" and contains six (6) subparts. In applying the general objections to the individual data requests, the Applicant and Joint Petitioners failed to state which specific subpart of Objection Number 1 was being raised to each data request.

Additionally, [Time Warner] contend[s] that the Pre-Hearing Officer should overrule certain objections asserted by the Applicant and Joint Petitioners against requests that merely seek to have the Applicant and Joint Petitioners update information provided by them in response to previous data requests. The Pre-Hearing Officer is unable to evaluate this part of the Motion to Compel without [Time Warner] first identifying the date and number of the earlier data request to which the current request seeks updated information.²

² *Order Directing Supplemental Filings*, p. 1-2 (Feb. 16, 2001).

The Pre-Hearing Officer then ruled that the supplemental filings should not contain any additional argument and must be filed no later than February 21, 2001.

On February 16, 2001, Applicant and Joint Petitioners filed *Applicant's and Joint Petitioners' Objections and Responses to the Data Requests of the Tennessee Cable Telecommunications Association, Time Warner Telecommunications, Time-Warner Telecom of the Mid-South, L.P.* In the cover letter, Applicant and Joint Petitioners explained that these responses "include and supercede the responses made on February 12, 2001."

As required by the February 16th Order, Time Warner and TCTA filed a supplement to its Motion to Compel, and Applicant and Joint Petitioners filed a supplement to the Objections. Once again, Applicant and Joint Petitioners notified the agency in their cover letter that this filing replaced the earlier Objections. In addition to the ordered supplement, Applicant and Joint Petitioners also filed *Applicant's and Joint Petitioners' Supplemental Responses to Data Request Number 35 of the Tennessee Cable Telecommunications Association, Time Warner Communications, and Time Warner of the Mid-South, L.P.* on February 21, 2001.

On February 23, 2001 Time Warner issued Subpoenas Duces Tecum for the depositions of Ward Huddleston, Larry Thompson, Andrew P. Seamons, and Alex Lowe. The subpoenas compelled the deponents named therein to appear for depositions in Memphis, Tennessee on February 28, 2001. Each of the subpoenas included a list of types of documents for the deponents to bring with them to the deposition.³

On February 26, 2001, Applicant and Joint Petitioners filed *Applicant's and Joint Petitioners' Motion to Quash Subpoenas Duces Tecum of Andrew P. Seamons, Larry Thompson, Alex Lowe, and Ward Huddleston and Motion for Order that Discovery Depositions Not be Had*

³ The subpoenas did not request any specific document, but rather requested general groups of documents such as "[d]ocuments which reflect the place where the cable/conduit has been installed, warehoused and delivered."

and Objection to Taking of Depositions Due to Errors and Irregularities (“Motion to Quash”). In the Motion to Quash, Applicant and Joint Petitioners moved to quash the depositions under Rules 45.01, 45.02, 26.03, and 32.04 of the Tennessee Rules of Civil Procedure and Rules 1220-1-2-.11 and 1220-1-2-.13 of the Rules of the Tennessee Regulatory Authority. Applicant and Joint Petitioners moved that the depositions not be had at any time pursuant to Rules 26.02, 26.03, 30.02, and 30.04 of the Tennessee Rules of Civil Procedure and Rules 1220-1-2-.11 and 1220-1-2-.13 of the Rules of the Tennessee Regulatory Authority. Applicant and Joint Petitioners further objected to the depositions due to errors and irregularities under Rules 30.02 and 32.04 of the Tennessee Rules of Civil Procedure. Finally, Applicant and Joint Petitioners asserted that counsel for the Applicant and MLGW was unavailable for the depositions as scheduled for February 28, 2001.

On February 26, 2001, following telephonic notice to the parties, the Pre-Hearing Officer entered an *Order Suspending Depositions for February 28, 2001, Holding Applicant’s and Joint Petitioners’ Motion to Quash in Abeyance and Setting Pre-Hearing Conference for March 6, 2001*.⁴ In this Order, the Pre-Hearing Officer specifically noted Applicant and Joint Petitioners’ argument as to the timeliness of the issuance of the subpoenas and their assertion that counsel for MLGW and the Applicant could not be available for the depositions on February 28, 2001. Additionally, the Pre-Hearing Officer commented that it was in the best interest of all parties to resolve the Objections and Motion to Compel before proceeding with depositions. Thereafter, the Pre-Hearing Officer ordered the depositions cancelled and held the Motion to Quash in abeyance pending resolution of the Objections and Motion to Compel.

⁴ The Pre-Hearing Officer later changed the conference date to March 8, 2001 by Notice issued on March 2, 2001.

On March 2, 2001, Time Warner filed its *Response to Applicant's and Joint Petitioners' Motion to Quash Subpoenas Duces Tecum of Andrew P. Seamons, Larry Thompson, Alex Lowe, and Ward Huddleston and Motion for Order that Discovery Depositions Not be Had and Objection to Taking of Depositions Due to Errors and Irregularities*. Time Warner contended that it is not attempting to circumvent the Rule 1220-1-2-.11 of the Rules of the Tennessee Regulatory Authority as alleged by Applicant and Joint Petitioners and that it is not acting in violation of Rule 26 of the Tennessee Rules of Civil Procedure.

PRE-HEARING CONFERENCE

The Pre-Hearing Officer convened the Pre-Hearing Conference, as renoticed, on March 8, 2001. The parties in attendance were as follows:

Memphis Networx, LLC ("Memphis Networx") and Memphis Light Gas & Water Division ("MLGW");- **D. Billye Sanders, Esq.**, Waller, Lansden, Dortch & Davis, Nashville City Center, 511 Union Street, Suite 2100, Nashville, TN 37219-8966;

Memphis Networx, LLC ("Memphis Networx") and Memphis Broadband, LLC ("Memphis Broadband") - **John Knox Walkup, Esq.**, Wyatt, Tarrant & Combs, 2525 West End Avenue, Suite 1500, Nashville, TN 37203;

Time Warner Communications of the Mid-South, Inc. and the Tennessee Cable Telecommunications Association ("Time Warner" and "TCTA") - **Charles B. Welch, Jr., Esq.**, Farris, Warfield & Kanaday, PLC, SunTrust Center, 424 Church Street, Suite 1800, Nashville, TN 37219-2327;

Time Warner Telecom of the Mid-South, L.P., ("Time Warner Telecom") - **John M. Farris, Esq.**, Farris, Mathews, Branan, Bobango & Hellen, One Commerce Square, Suite 2000, Memphis, TN 38103;

Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter ("Consumer Advocate") - **Vance Broemel**, Esquire, and **Shilina Chatterjee**, Esquire, Office of Attorney General, 425 5th Avenue North, Cordell Hull Building, Nashville, TN 37243-0500; and

BellSouth Telecommunications, Inc. and the TDS Companies did not participate in the Pre-Hearing Conference.

During the Conference, the Pre-Hearing Officer questioned the parties regarding the Objections and Motion to Compel. The Pre-Hearing Officer requested that the Applicant and Joint Petitioners elaborate on certain Objections, in particular those based on proprietary information. Applicant and Joint Petitioners argued that they should not have to provide certain information because it is commercially sensitive. Specifically, Applicant and Joint Petitioners asserted that, not only is the previous alleged violation of the Protective Order an issue, but also that there should be a heightened level of scrutiny given the highly confidential and commercially sensitive content of some of the requested documents. Applicant and Joint Petitioners also explained that some of the requested information is subject to the attorney/client privilege and should not be provided. Additionally, Applicant and Joint Petitioners argued that they should not have to provide any information that does not relate to the Amended Operating Agreement because such information is outside the limited scope of discovery set forth by the Pre-Hearing Officer.

Applicant and Joint Petitioners also represented that, despite their objections, they have responded either completely or to the extent they deem proper to most of the data requests. Time Warner stated that it could not determine at that time whether or not the Applicant and Joint Petitioners had fully responded to specific data requests.

After further discussion on numerous issues related to the data requests and depositions, the parties agreed to meet within 24 hours in an attempt to resolve their disputes. The Pre-Hearing Officer accepted this agreement and ordered, without objection from any party, that the parties file a statement or stipulation regarding the outcome of their meeting by no later than 4:30 p.m. on March 9, 2001. In light of the extensions granted to the parties for completion of

discovery, the Pre-Hearing Officer extended the time for submitting pre-filed rebuttal testimony to Wednesday, March 21, 2001.

PARTIES' STIPULATION

On March 9, 2001, the Applicant, Joint Petitioners, and Time Warner requested by telephone an extension of time until March 13, 2001 at 11:00 a.m. for filing a joint stipulation regarding the outstanding discovery issues. Upon notice to all parties, the Pre-Hearing Officer granted the request, cautioning the parties that pre-filed rebuttal testimony would remain due on Wednesday, March 21, 2001 and that the Hearing would remain scheduled to begin on March 26, 2001.

On March 13, 2001, Applicant, Joint Petitioners, and Time Warner filed *Joint Stipulations in Response to Motion to Compel* ("Stipulations"). The Stipulations addressed the outstanding requests, numbers 1(b), 4-8, 10, 12, 15, 17-21, 31, and 35-38.⁵ The Stipulations also contained the following statements regarding the depositions:

39. **Depositions.** MLGW, Memphis Broadband, Time Warner and TCTA agree that if depositions take place the following date and time is agreeable: March 19, 2001, 9:30 a.m. The aforementioned parties agree that such depositions, if any, will be taken in Nashville at the TRA. Applicant and Joint Petitioners request that the depositions of each deponent be limited to one hour. Time Warner and TCTA do not agree to such time limitation. Time Warner and TCTA will be responsible for making arrangements for a court reporter.

The Stipulations contained generally four responses. First, as to request numbers 4, 15, and 35, Applicant, Joint Petitioners, and Time Warner agreed that the previous responses are satisfactory. Second, as to request numbers 1(b), 5, 6, 7, 8, 10, 12, 20, and 39, the parties agreed that Applicant and Joint Petitioners will provide supplemental responses. In some instances there appears to be an agreement as to what Applicant and Joint Petitioners will provide, but in

⁵ The Stipulations specifically state that the Motion to Compel did not include requests numbers 1(a), 2, 3, 9, 11, 13, 14, 16, 22-30, 32-34, and 39.

other instances there is no such assertion. Third, as to request numbers 17, 21, and 31, the parties specifically stated that the parties had failed to reach an agreement, but that Applicant and Joint Petitioners would provide supplemental responses. Lastly, as to request numbers 18, 19, 36, and 37, the parties did not reach an agreement and Applicant and Joint Petitioners will not agree to provide supplemental responses.

On March 15, 2001, Applicant and Joint Petitioners filed *Supplemental Responses to Data Request* which provided further responses to request numbers 5, 6, 7, 8, 10, 12, 17, 20, 21, 31, 32 and 38. Given these assertions, the Pre-Hearing Officer finds that the only discovery requests requiring action at this time are 18, 19, 36, and 37.

On March 16, 2001, the Pre-Hearing held telephone conversations with counsel for the Applicant and MLGW and counsel for Time Warner. These parties informed the Pre-Hearing Officer that they had reached certain agreements regarding the taking of the depositions and the production of documents, leaving open the issues of the length of the depositions and the scope of certain documents requests.

OBJECTIONS TO SPECIFIC DATA REQUESTS

Request Nos. 18 and 19

The Stipulations state Request No. 18 as follows: “Identify and provide any and all documents regarding the amount of joint and common costs incurred by MLGW during FY 2000 and the first month of 2001.” The Stipulations state Request No. 19 as follows: “Identify and provide any and all documents showing the dollar amount of joint and common costs allocated to each division of MLGW during FY 2000 and the first month of 2001.” The corresponding comment for each is: “A prior response was made. No stipulation has been agreed to by the parties.” Applicant and Joint Petitioners objected to these requests on the following grounds:

- Beyond the scope because it request information relating to events prior to the filing of the Amendment which do not relate in any way to the Amendment or the Amended and Restated Operating Agreement (Objection No. 1(a));
- Beyond the scope because it requests information concerning activities of MLGW which do not relate to the Amendment (Objection No. 1(e));
- Not a new issue;
- Related to events that transpired prior to the date of the transfer in ownership on November 29, 2000 (Objection No. 3);
- Not relevant to the limited scope of these proceedings (Objection No. 4); and
- The definition of “identify” is too broad (Objection No. 5).

Tenn. Code Ann. § 65-25-231(a)(2) prevents subsidization from a member of the joint venture to the entity providing telecommunications services except as specifically provided therein. Request Nos. 18 and 19 relate to the ongoing issues of whether MLGW is providing a subsidy to Memphis Networx and whether MLGW is maintaining its financial records in a manner that would allow third parties to verify that subsidization from MLGW to Memphis Networx is not occurring. Given the requirement of Tenn. Code Ann. § 65-25-231(a)(2), the inquiry into how MLGW incurs and allocates joint and common costs is relevant to the subject matter of this case.

Having determined that the information is relevant, the next issue is whether it is within the limited scope of discovery. The Pre-Hearing Officer finds that the first five bulleted items above, Objection Nos. 1(a), 1(e), 3, 4 and the assertion that the request is not a new issue, all relate to whether these requests are within the scope of the additional discovery. The Pre-Hearing Officer has limited discovery to “new issues raised by the Amended Application and pre-filed testimony submitted therewith.”⁶

Despite Applicant and Joint Petitioners’ extremely narrow interpretation of the Pre-Hearing Officer’s limitation, the issue of subsidization appears in the pre-filed supplemental

⁶ *Order Granting IBEW’s Motion to Withdraw, Establishing Procedural Schedule, and Setting Hearing Date*, p. 6 (Feb. 9, 2001).

testimony of Ward Huddleston, Jr. and the pre-filed testimony of Andrew P. Seamons. In the testimony, counsel asked Mr. Huddleston: “Will Memphis Networkx continue to be audited by independent auditors and provide annual reports to the Authority?” Mr. Huddleston responded: “Yes. All start up expenses incurred by Memphis Networkx will continue to be audited by an independent auditor, Ernst & Young to ensure that they are properly allocated. The accounting standards and cost allocation procedures utilized by MLGW will not be affected by Memphis Broadband’s ownership in Memphis Networkx.”⁷ Counsel for Memphis Broadband asked Mr. Seamons: “Are you familiar with the cross subsidy prohibitions under state law?” Mr. Seamons responded:

Yes. All transactions between MLGW and Memphis Networkx will be at arm’s length. I understand that MLGW has adopted safeguards to prevent subsidies to Memphis Networkx. Memphis Broadband supports the adoption of these safeguards. Memphis Broadband also supports the steps offered by Memphis Networkx to prevent subsidies, including the submission of annual reports to the Authority, and the utilization of independent auditors to review Memphis Networkx’s books.⁸

The issue of instituting and maintaining practices to prevent subsidization is an ongoing issue in this proceeding. The issue of whether MLGW is continuing to use those same practices since the change in ownership of Memphis Networkx is an additional issue raised in the pre-filed testimony. Therefore, the Pre-Hearing Officer finds that these requests are within the scope of discovery.

Applicant and Joint Petitioners further contend that the definition of the term “identify” is too broad. The Pre-Hearing Officer agrees. The use of the term “identify” as it relates to the discovery requests is defined to include:

⁷ *Pre-filed Supplemental Testimony of Ward Huddleston, Jr. on Behalf of Memphis Networkx, LLC*, pp. 2 (Dec. 21, 2000).

⁸ *Pre-filed Testimony of Andrew P. Seamons on Behalf of Memphis Broadband, LLC*, pp. 3-4 (Dec. 21, 2000).

the date of the document, the identity of the author or preparer of the document, the contents of the document, the identity of each person to whom a copy or copies were sent, the type of document (e.g., letter, memorandum, tape recording, etc.), the substance and summary of the contents of the document, the title or label (if any) of the document, the present or last-known location and custodian of the document and any copies thereof, and if any such document was, but is no longer, in your possession, custody or control or is no longer in existence, state whether it: (1) is missing or lost; (2) has been destroyed; or (3) has been transferred voluntarily or involuntarily, and if so, state the circumstances surrounding the authorization for each such disposition and the date of such disposition.

Applicant and Joint Petitioners object to the inclusion of the identity of persons to whom copies were sent, a summary of the documents, the last-known location and custodian of the document, and the reason the document is no longer in existence. The Pre-Hearing Officer finds that the above definition is overly burdensome for some of the reasons proffered by Applicant and Joint Petitioners.

The Pre-Hearing Officer finds that Applicant and Joint Petitioners should not have to list persons to whom copies were sent or provide a summary of the document. Time Warner will have the document itself to review. Thus, requiring the provision of a summary is duplicative and unnecessary.

The Pre-Hearing Officer further finds that the requirement that Applicant and Joint Petitioners provide the last-known location and custodian of the document is not overly burdensome and is relevant to authentication. While it is not completely clear whether the “last-known location” request refers to the document or the custodian, the Pre-Hearing Officer determines that it applies to the custodian, as information regarding the last-known location of the document would be provided with an explanation of why a document is missing or destroyed. Applicant and Joint Petitioners shall provide the name of the custodian of the document and the last known address of that person.

In summary, the Pre-Hearing Officer finds that Request Nos. 18 and 19 are relevant and within the scope of discovery. Nonetheless, the definition of “identify” is overly broad and is limited as set forth above. For these reasons, the Motion to Compel is granted in part as to Request Nos. 18 and 19 and the Objection is sustained as to the definition of “identify.”

Request Nos. 36 and 37

The Stipulations state Request No. 36 as follows: “Provide a complete explanation of the term ‘digital divide’ according to MLGW’s, Memphis Broadband’s and/or Memphis Networkx’s understanding of such term and provide a copy of all workpapers and/or studies that have been prepared by or on behalf of MLGW, Memphis Broadband, A&L, and Memphis Networkx that discuss the investment required to bridge the digital divide in Shelby County.” The Stipulations state Request No. 37 as follows: “Provide a description of the term ‘underserved area’ as used in the prefiled testimony of William Larry Thompson and Andrew Seamons and identify each geographic area within Shelby County that is deemed to be “underserved” according to MLGW, Memphis Broadband and/or Memphis Networkx.” The corresponding comments for each is: “A prior response was made. No stipulation has been agreed to by the parties.” Applicant and Joint Petitioners objected to each of these requests on the following grounds:

- It is beyond the scope because the request seeks information relating to events prior to the filing of the Amendment which do not relate in any way to the Amendment or the Amended and Restated Operating Agreement (Objection No. 1(a));
- It requests information pertaining to Alex Lowe, A&L Networks-Tennessee, LLC and other entities affiliated with Mr. Lowe who no longer have ownership interest in Memphis Networkx (Objection No. 1(b));
- It is open ended and lacks a defined timeframe (Objection No. 1(c));
- It requests information related to the activities of Memphis Broadband and its affiliates, which do not relate to the Amendment (Objection No. 1(d));
- It is beyond the scope because it requests information concerning activities of MLGW which do not relate to the Amendment (Objection No. 1(e));
- It requests information concerning activities of Memphis Networkx which do not relate to the Amendment (Objection No. 1(f));
- It is not a new issue;

- It requests information that is commercially sensitive and confidential (Objection No. 2);
- It is related to events that transpired prior to the date of the transfer in ownership on November 29, 2000 (Objection No. 3);
- It is not relevant to limited scope of these proceedings (Objection No. 4); and
- The definitions of “Memphis Broadband” and “A&L” are too broad (Objection No. 5).

Upon reviewing the Responses filed, the Pre-Hearing Officer finds that Applicant and Joint Petitioners have adequately responded to portions of these requests. In particular, Applicant and Joint Petitioners have sufficiently responded to the request that they provide a “complete explanation of the term ‘digital divide.’” Applicant and Joint Petitioners have also sufficiently responded to the request to “provide a description of the term ‘underserved area’ as used in the prefiled testimony of William Larry Thompson and Andrew Seamons”

Time Warner also requested in Request No. 36 that Applicant and Joint Petitioners “provide a copy of all workpapers and/or studies that have been prepared by or on behalf of MLGW, Memphis Broadband, A&L, and Memphis Networkx that discuss the investment required to bridge the digital divide in Shelby County.” The Pre-Hearing Officer finds that this request is relevant to a determination of whether Memphis Networkx will be able to meet its goal, as represented to the Authority, to serving underserved areas. As before, the question now becomes whether the request is within the scope of the limited discovery.

This determination is not a new issue. Applicant and Joint Petitioners assert that there have been no changes in the definitions and goals of Memphis Networkx related to the digital divide and underserved areas. Thus, the investment estimation will not have changed. Had Time Warner wished to obtain this information it could have done so during the earlier proceeding.

Time Warner also requested that Applicant and Joint Petitioners “identify each geographic area within Shelby County that is deemed to be ‘underserved’” in Request No. 37.

The Pre-Hearing Officer finds that the fact sought to be proven by this request must be material in order to be relevant. A material fact “is of consequence to the determination of the action.”⁹ A list of those areas that MLGW, Memphis Broadband and/or Memphis Networkx consider to be underserved is not of consequence to the determination of the issues in this case. Moreover, even if the evidence was relevant, the probative value of such evidence is substantially outweighed by the possibility of confusion of the issues and undue delay.¹⁰ Lastly, Time Warner could have also received this information during previous discovery.

In summary, the Pre-Hearing Officer finds that the Applicant and Joint Petitioners have provided sufficient explanations of the terms “digital divide” and “underserved.” In addition, any further requests in Requests Nos. 36 and 37 are either untimely or not within the scope of the limited discovery. For these reasons, the Motion to Compel is denied as to Request Nos. 36 and 37 and the Objections are sustained.

DEPOSITIONS

Applicant, Joint Petitioners, Time Warner, and the Consumer Advocate appeared at the offices of the Authority on March 19, 2001 for the purposes of conducting the depositions of Andrew P. Seamons, Ward Huddleston, and Larry Thompson. Prior to the start of the depositions, the Pre-Hearing Officer ruled on the issue of length of time for the depositions and determined that rather than set a specific amount of time for each deposition, all of the depositions must be concluded not later than 5:00 p.m. on March 19, 2001.

During the course of and at the conclusion of the depositions, the Pre-Hearing Officer appeared before the parties to resolve any outstanding disputes. At issue was the necessity of the Applicant and Joint Petitioners to provide Time Warner copies of certain closing documents, a

⁹ See Tenn. R. Evid. 401 (advisory comments).

¹⁰ See *id.* 403.

consultant report, and a private offering memorandum rather than limiting Time Warner to mere inspection. Also, the Applicant and Joint Petitioners raised an objection to Time Warner's request during the deposition of Ward Huddleston for documents. As to the later issue, after hearing arguments from the parties, the Pre-Hearing Officer instructed Time Warner to place its request in writing with supporting arguments no later than Tuesday, March 20, 2001 at 2:00 p.m. Likewise, the Pre-Hearing Officer instructed Applicant and Joint Petitioners, if they desired to respond in writing, to file their response no later than Wednesday, March 21, 2001 at 2:00 p.m.

Certain Closing Documents

During the discussions, Applicant and Joint Petitioners argued that they should not have to provide a copy of the requested closing documents because the parties stipulated that such documents would only be available for inspection at counsel's office. Time Warner stated that it mistakenly agreed to this limitation and that Applicant and Joint Petitioners should provide a copy. Thereafter, the Pre-Hearing Officer ruled in favor of the Applicant and Joint Petitioners finding that the parties' stipulation limited access to inspection at counsel's office.¹¹ The Pre-Hearing Officer ruled further that if any of those documents were to be utilized as exhibits in this case then copies need to be provided to the Intervenors.

Consultant Report and Private Offering Memorandum

Applicant and Joint Petitioners initially argued that they should not have to produce a consultant report and a private offering memorandum due to the confidential nature of both documents. Applicant and Joint Petitioners stated that on the face of the consultant report was a notation that the report should not be disseminated absent written notification to the consultant. Applicant and Joint Petitioners stated that the private offering memorandum could not be shared

¹¹ The Pre-Hearing Officer ordered that the closing papers be available to all parties for inspection and use during the taking of the depositions on March 19, 2001.

due to the requirements of federal securities law. Later, however, Applicant and Joint Petitioners agreed to waive both of these “restrictions” and produced the documents during the depositions as confidential. Nevertheless, they continued to assert that they should not have to provide a copy of the documents to Time Warner. Time Warner contended that the documents fell within the scope of the subpoena duces tecum and, therefore, they should receive copies.

Applicant and Joint Petitioners admitted when questioned by the Pre-Hearing Officer that the documents did fall within the scope of the subpoena and did not provide any justification as to why, after the documents had been produced, Time Warner should not receive copies. The Pre-Hearing Officer determined after hearing the parties’ arguments that Time Warner should receive copies. The Pre-Hearing Officer however, required that the documents not be disseminated to clients of Time Warner regardless of whether the Protective Order in this case provides for such limitation.

Documents Pertaining to The Cambridge Strategic Management Group

On March 20, 2001, pursuant to the Pre-Hearing Officer’s directive, Time Warner filed *Intervenors’ Discovery Deposition Data Request*. Time Warner requested a copy of a “business plan” prepared by The Cambridge Strategic Management Group for Applicant. Time Warner contended that this request is a part of prior Data Request Nos. 5 and 21.

On March 21, 2001, Applicant and Joint Petitioners filed *Objection to Document Production*. Applicant and Joint Petitioners assert the following arguments: (1) the request is untimely because it does not fall within the previous data requests or the subpoena production and the time for filing such requests has expired; (2) the request is excessive, as Time Warner has already issued the maximum number of data requests; (3) the document is not a “business plan” and, therefore, would not fall within the scope of Data Requests No. 5 nor is it a document

showing “total payments” to consultants as requested in Data Request No. 21; (4) the document is outside the scope of this proceeding and would not lead to the production of admissible evidence; (5) the document contains extremely competitive-sensitive information; (6) release of the information would have anti-competitive effects in violation of state and federal law; (7) Time Warner has not met its burden of demonstrating specific and compelling reasons for production; (8) the Authority has not required production of such information from other applicants; (9) the documents are interim subject to change; and (10) Applicant and Joint Petitioners have produced many documents and it is not unreasonable to determine that there is some documentation of a private company that will remain private.

Upon review of Time Warner’s request, including the excerpts of Ward Huddleston’s deposition testimony during which the request arose, the objections, and other documents reflecting strategic and business plans admitted into evidence during the previous hearings in this matter, the Pre-Hearing Officer determines that ruling on the production of the documents pertaining to the Cambridge Strategic Management Group requires that the Pre-Hearing Officer conduct an in camera inspection. Without such inspection, the Pre-Hearing Officer is unable to determine how the documents at issue differ in scope and commercial sensitivity from the documents already admitted in this case.

IT IS THEREFORE ORDERED THAT:

- 1) As to Data Request Nos. 18 and 19, the Motion to Compel is granted in part and the Objection is sustained as set forth herein as to the definition of “identify.”
- 2) As to Data Request Nos. 36 and 37 the Motion to Compel is denied and the Objections are sustained.

- 3) Time Warner is restricted to inspection of the Closing Documents at the offices of Counsel for MLGW. If, however, any party wishes to introduce any of these documents as exhibits during the Hearing, Applicant and Joint Petitioners shall provide all parties with the necessary copies upon request.
- 4) Applicant and Joint Petitioners shall provide to Time Warner copies of the Consultant Report and Private Offering Memorandum.
- 5) Applicant and Joint Petitioners shall provide the Pre-Hearing Officer with copies of documents requested by Time Warner pertaining to the Cambridge Strategic Management Group for the purpose of conducting an in camera inspection. Such documents shall be produced to the Pre-Hearing Officer no later than **9:00 a.m. Monday, March 26, 2001.**


J. RICHARD COLLIER
ACTING AS PRE-HEARING OFFICER

ATTEST:



K. David Waddell, Executive Secretary